

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED

MAR 15 2006

ELVIA GONZALEZ BARRUETA,

Petitioner,

v.

ALBERTO R. GONZALES, Attorney
General,

Respondent.

No. 04-72113

Agency No. A73-391-807

MEMORANDUM*

CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

On Petition for Review of an Order of the
Board of Immigration Appeals

Submitted July 7, 2005**

Before: SKOPIL, BOOCHEVER, and LEAVY, Circuit Judges.

Elvia Gonzalez Barrueta petitions for review of the dismissal by the Board of Immigration Appeals (BIA) of her appeal from the denial of her application for cancellation of removal by an Immigration Judge (IJ), alleging ineffective assistance of counsel. We have jurisdiction under 8 U.S.C. § 1252(a) and we grant the petition and remand for further proceedings.

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** This panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

DISCUSSION

Gonzalez Barrueta, a native and citizen of Mexico, entered the United States without inspection in March 1988. She was charged in 2002 with removability under 8 U.S.C. § 1182(a)(6)(A)(i). Although she initially sought asylum, she withdrew that application and requested permission to file an application for cancellation of removal. Gonzalez Barrueta's attorney, however, failed to file a timely application. As a consequence, the IJ determined that Gonzalez Barrueta's request for cancellation of removal was abandoned.

With new counsel, Gonzalez Barrueta appealed to the BIA, arguing for a remand to the IJ for a hearing on the merits of her request for cancellation of removal. She asserted her case should be reopened because her failure to file a timely application was a result of her attorney's malpractice. The BIA dismissed the appeal, finding that Gonzalez Barrueta "failed to meet her burden of demonstrating that she received ineffective assistance of counsel before the Immigration Judge. See Lata v. INS, 204 F.3d 1241 (9th Cir. 2000); Matter of Lozada, 19 I & N Dec. 637 (BIA 1988)."

We construe the BIA's dismissal to be based on Gonzalez Barrueta's failure to satisfy the threshold procedural requirements established in Lozada. Under Lozada, Gonzalez Barrueta had to provide "(1) an affidavit by the alien setting

forth the agreement with counsel regarding the alien's representation; (2) evidence that counsel was informed of the allegations and allowed to respond; and (3) an indication that a complaint has been lodged with the bar, or reasons explaining why not." Lata, 204 F.3d at 1246. Gonzalez Barrueta concedes that she did not comply with all three requirements, but argues that she should be excused because the record clearly shows ineffective assistance. We agree. We do not require strict adherence to Lozada where counsel's ineffective assistance is obvious and undisputed on the face of the record. Reyes v. Ashcroft, 358 F.3d 592, 597 (9th Cir. 2004). Here, Gonzalez Barrueta's counsel's failure to file a timely application for cancellation of removal constitutes deficient representation. See Rodriguez-Lariz v. Ashcroft, 282 F.3d 1218, 1226-27 (9th Cir. 2002). Thus, the BIA should have excused Gonzalez Barrueta's failure to comply with Lozada's requirements. Accordingly, we remand to the BIA so that it can address her claim of ineffective assistance of counsel on the merits. See Ontiveros-Lopez v. INS, 213 F.3d 1121, 1125 (9th Cir. 2000).

PETITION FOR REVIEW GRANTED; REMANDED.